Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1526

SOUTHERN & NORTHERN OVERLYING CARRIER CHAPTERS OF THE CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS

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Dated: August 31, 1977

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Appellee, the Public Utilities Commission of the State of California, hereinafter referred to as Commission, pursuant to Supreme Court Rule 16, respectfully moves that the Court dismiss the appeal of the Southern & Northern Overlying Carrier Chapters of the California Dump Truck Owners Association, for the reason that the Commission has reopened the proceedings in the complained-of decision and the

appeal is, therefore, not of a final judgment and is premature.

STATEMENT OF FACTS

On June 8, 1976, the Commission issued Decisions Nos. 85918, 85919, and 85920, which established in Minimum Rate Tariffs 7-A, 17-A, and 20 rules governing the division of revenues between overlying carriers and underlying carriers when trailers are furnished by the overlying carrier to the underlying carrier. These decisions are the subject of the present appeal.

On September 1, 1976, the Commission issued Decision No. 87362, which suspended until further order the orders in Decisions Nos. 85918, 85919, and 85920. The reason for the suspension and amendments was to allow Southern and Northern Overlying Carrier Chapters of the California Dump Truck Association, appellants herein, time to seek review of the Commission Decisions Nos. 85918, 85919, and 85920 in the California Supreme Court.

On January 5, 1977, the California Supreme Court denied the petition for writ of review of Appellant. On January 21, 1977, Appellant filed with the California Supreme Court a petition for rehearing and stay of the effective date of the Court's order. On February 4, 1977, the Court denied this petition.

On January 24, 1977, petitioner filed with the Commission a petition for a further suspension order which has not been acted upon. The orders in Decisions Nos. 85918, 85919, and 85920 remain suspended.

On June 14, 1977, following its filing of the Jurisdictional Statement with this Court, Appellant filed with the Commission a Petition to Set Aside Submission and to Reopen Proceedings in Decisions Nos. 85918, 85919, and 85920. The petition states that Appellant has changed its position with respect to the Commission's establishment of a division of revenues between underlying and overlying carriers and that Appellant would accept a division of revenues on all transportation performed pursuant to the Minimum Rate Tariffs 7-A, 17-A, and 20, provided that the division of revenues allocate 25% of the minimum rate to the overlying carrier and 75% to the underlying carrier.

On June 5, 1977 the three cases were reopened by the Commission. Hearings were held on July 19, 1977 and further hearings have been scheduled for September 7 and 8, 1977.

ARGUMENT

I.

THE APPEAL IS PREMATURE BECAUSE NOT OF A FINAL JUDGMENT

The Commission decisions which are the subject of this appeal have been stayed pending appeal to the California Supreme Court and now to this Court. Further, since the present appeal was filed, the Commission has reopened the cases at the request of Appellant and is in the process of rehearing those aspects

of its decisions of which Appellant complains in its Jurisdictional Statement.

Appellee, therefore, submits that the complained-of decisions are not "final" within the meaning of Title 28, Section 1257 of the United States Code, under which Appellants bring this action. This Court has consistently refused to accept jurisdiction of cases in which the administrative procedure has not been completed. The rationale given has been that the Courts ought not to interfere with the state or federal legislative function until the procedure has been completed and that all administrative remedies should be exhausted before resort to the federal courts. *United States v. Fletcher,* 147 U.S. 664, 37 L.Ed. 322, 13 S.Ct. 434 (1898); *Degge v. Hitchcock,* 229 U.S. 162, 57 L.Ed. 1135, 33 S.Ct. 639 (1912). In *Boston & Maine R. Co. v. United States,* 358 U.S. 68, 3 L.Ed. 2d 34, 79 S.Ct. 107 (1959), this Court dismissed as premature an appeal from a three judge District Court decision remanding a controversy to the Interstate Commerce Commission for determination of the question of that Commission's jurisdiction where the Commission had indicated its readiness to consider the question. Appellee submits that the Court should apply this same rationale to the present case. The Commission has not only expressed its readiness to reconsider the questions presented; it is actively doing so, and at the request of the Appellant.

II.

APPELLANT HAS FAILED TO SHOW ANY INJURY IN ITS COMPLAINT REGARDING EXCLUSION OF PUBLIC WORKS CONTRACTS

Appellant first argues that the Commission erred in providing for the division of revenues between underlying and overlying carriers. It then complains of the Commission's exclusion of public works projects from the decision. Appellee submits that such arguments are not only inconsistent, but that Appellant has failed to show any economic or other injury resulting from such exclusion and, therefore, lacks standing to raise this issue. In *Donaldson v. Read Magazine, Inc.,* 33 U.S. 178, 92 L.Ed. 628, 68 S.Ct. 591 (1947) this Court found that the modification of a complained-of order, limiting the number of persons to whom it applied, in effect granted relief from the provisions of the order and did not constitute an injury sufficient to confer standing.

CONCLUSION

For the above reasons, Appellee respectfully requests that the appeal be dismissed.

Respectfully submitted,

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Attorneys for Appellee Public Utilities Commission of the State of California.

Dated: August 31, 1977